BEFORE THE CPR INSTITUTE FOR DISPUTE RESOLUTION ARBITRAL TRIBUNAL

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Claimant,

v. Arbitration I

BELLSOUTH
TELECOMMUNICATIONS INC.,

Respondent.

****

BELLSOUTH
TELECOMMUNICATIONS INC.,

Claimant ,

v. Arbitration II

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Respondent and
Counterclaimant.

ORDER REGARDING SUPRA'S AND BELLSOUTH'S MOTIONS FOR INTERPRETATION OF THE JUNE 5, 2001 AWARD IN CONSOLIDATED ARBITRATIONS

ARBITRAL TRIBUNAL

M. Scott Donahey
John L. Estes
Campbell Killefer

A. Introduction

The two arbitrations conducted to date between Supra Telecommunications & Information Systems, Inc. ("Supra") and BellSouth Telecommunications, Inc. ("BellSouth") resulted in a single Award of the Tribunal in Consolidated Arbitrations, dated June 5, 2001 (the "Award"). By motions entitled Supra's Request For Clarification of Award of the Tribunal in Consolidated Arbitrations and Default Damages as a Result of BellSouth's Non-Compliance With Same, dated June 20, 2001, and BellSouth's Motion for Reconsideration and Interpretation, dated June 20, 2001, the parties sought to clarify, to interpret, and to modify many of the Tribunal's liability and damages findings in the Award. In addition, BellSouth filed its Motion for Partial Stay on June 21, 2001, to stay that portion of the Award that orders BellSouth to "provide Supra nondiscriminatory direct access" to BellSouth's Operations Support Systems ("OSS").

The Tribunal's powers to deal with an Award after it is issued are circumscribed by the CPR Rules, the rules which the parties have agreed govern the conduct of the arbitration. Interconnection Agreement, Attach. 1, § 4. CPR Rules, Rule 14.5 expressly limits the Tribunal's powers as follows:

> Within 15 days after receipt of the award, either party, with notice to the other party, may request the Tribunal to interpret the award; to correct any clerical, typographical or computation errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any interpretation, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests an interpretation, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All interpretations, corrections, and additional awards shall be in writing, and the provisions of this Rule 14 shall apply to them.

By Order dated June 22, 2001, the Tribunal set a briefing schedule on the motions and directed various questions to the parties. In addition, at the request of both parties, the Tribunal scheduled an in person hearing, as opposed to telephonic hearing, for oral argument on the motions for July 16, 2001.

In accordance with the Tribunal's scheduling Order, Supra and BellSouth served their responsive briefs on June 27, 2001. Supra filed its opposition to BellSouth's motion for partial stay on June 29, 2001. Both parties filed reply briefs on the motions on July 10, 2001.

The hearing for oral argument was conducted on July 16, 2001, in the Piedmont Ballroom at the Georgian Terrace Hotel in Atlanta, Georgia. The hearing lasted approximately five hours. The transcript of that hearing is incorporated by reference and made a part of this Order regarding the parties' motions.

B. Supra's Nondiscriminatory Direct Access to BellSouth's OSS

BellSouth's major argument in its motion is that the Tribunal erred in ordering "nondiscriminatory direct access to BellSouth's OSS" by no later than June 15, 2001. Award, at 24. By far the most briefing and oral argument were devoted to this issue over the many other issues raised. Many, if not all, of the arguments BellSouth raised in the papers and orally at the hearing that were directed to access to OSS were made for the first time and had not been raised prior to the issuance of the Award, despite the fact that BellSouth was clearly on notice that Supra was seeking direct access to the BellSouth OSS. *See, e.g.*, Supra Prehearing Statement, dated April 10, 2001, at § IV,F(c), at page 21.

BellSouth argued that in requiring **direct** access to BellSouth's OSS, the Award violates contractual provisions in the Interconnection Agreement concerning electronic interfaces, principally in Attachment 15, and the regulatory guidelines set forth by the FCC in

its Third Report and Order and Fourth Further Notice of Proposal Rulemaking, FCC 99-238, released November 5, 1999 ("Third Report and Order"). BellSouth concedes that nondiscriminatory access to the BellSouth OSS is a necessary prerequisite to Supra's and other Competitive Local Exchange Carriers' ("CLEC") ability to pre-order, order, provision, and repair telecommunication elements in a competitive marketplace. BellSouth challenges the need, however, for **direct** access and argues that the spirit of the Award and the Interconnection Agreement can be achieved by the Award being modified to require either (1) Supra's use of BellSouth's existing Direct Order Entry ("DOE") system, or (2) a new, so-called "permanent" or unique interface to BellSouth's OSS be created jointly by Supra and BellSouth. The Tribunal disagrees with BellSouth.

BellSouth's attempt to create a false dichotomy – Supra must choose either DOE or a new interface to be developed – conflicts with the fundamental basis of the OSS ruling in the Award. None of the proffered interfaces are at parity with BellSouth's own systems. The interface used now by Supra, the Local Exchange Navigation System ("LENS"), provides nothing close to the direct access to OSS used daily by BellSouth's own customer service representatives. BellSouth's DOE is even worse than LENS because DOE is an antiquated DOS-based system that has none of the user-friendly Windows-based features enjoyed by BellSouth's employees. Moreover, BellSouth argued at the July 16 hearing, but submitted no evidence, that another ILEC's interface with only a four second delay was found to provide parity service. There is no evidence that BellSouth's LENS, DOE, or other interfaces offer anywhere near comparable performance to that which BellSouth described.

Faced with the overwhelming deficiencies in DOE and its other interfaces offered to Supra and other CLEC's, BellSouth argues the second part of its false dichotomy – that Supra must jointly develop a new interface with BellSouth. The record shows that both AT&T and

Supra attempted to create their own interfaces to BellSouth's OSS and abandoned their projects. Even Attachment 15 to the Interconnection Agreement, while providing detailed provisions concerning interfaces, expressly provided that "[t]his Attachment 15 reflects compromises on the part of both [Supra] and BellSouth. By accepting this Attachment 15, [Supra] does not waive its right to non-discriminatory access to Operations Support Systems of BellSouth." Interconnection Agreement, Attachment 15, § 10.1. In addition, the same Attachment 15 on which BellSouth so heavily relies indicates in its "Purpose" section that:

> For all Local Services, Network Elements and Combinations ordered under this Agreement, BellSouth will provide [Supra] and its customers ordering and provisioning, maintenance, and repair and pre-ordering services within the same level and quality of service available to BellSouth, its Affiliates, and its customers.

Id., at Attachment 15 § 1.2 (emphasis added). Finally, the FCC's Third Report and Order found that "lack of access to [BellSouth's and other ILEC's] OSS impairs the ability of requesting carriers to provide the services they seek to offer." Third Report and Order § 433, at 192.

For all of these reasons, the only relief that will provide Supra with OSS access at parity with the access enjoyed by BellSouth, which is what is called for in the Interconnection Agreement, is nondiscriminatory **direct** access by Supra. Such access must be provided while accommodating BellSouth's legitimate concerns regarding network security and customer privacy. Supra assured the Tribunal at the July 16 hearing that it would abide by reasonable security and privacy measures. The Award directs BellSouth to provide such access forthwith.

C. Interpretation of Collocation Section of Award

The Tribunal issues the following interpretation of the portion of the Award on collocation. Collocation is discussed at pages 17-21 and 48 of the Award. The Award states in pertinent part: "The Tribunal orders that BellSouth collocate forthwith all such equipment as Supra has included in all prior applications to BellSouth at the rates indicated in Table 2 attached to the July 24, 1998, letter incorporated into the Interconnection Agreement. To the extent that the collocation involves 'make-ready' work that may not be covered by Table 2, Supra may retain a contractor of its choosing from BellSouth's approved contractor list to perform such work at Supra's expense. To the extent that work or services by BellSouth are necessary to collocation and that such work or services are not covered by the rates set out in Table 2, the Tribunal instructs the parties to consult the Interconnection Agreement for guidance and to meet and confer regarding the applicable rates for such work or services. To the extent that the parties are unable to agree on such rates, the parties are to submit their differences over such rates to the Tribunal for Resolution."

By this language, it was and is the intent of the Tribunal that collocation begin forthwith and continue apace while the parties attempt to agree on the cost thereof. If the parties fail to agree on the cost, the parties can bring their dispute concerning such cost to the Tribunal for resolution. In no event is the failure to agree on costs to be used as an excuse for failing to collocate or for slowing the progress of collocation.

D. Audit

Supra has requested that the deadline for completion of the audit be extended to thirty (30) days following the receipt of all documents requested by Supra. BellSouth opposes this request and argues that Supra has requested documents not relevant to the scope of the audit ordered by the Tribunal. BellSouth has requested that it be given 14 business days following

completion of the audit in order to audit the results and prepare a response. Supra did not oppose this request.

The Award defines the scope of the audit at the following places in the Award: Section V,O at pages 36-38; Section VI,B,1 at pages 41-42; Section VII,A at pages 44-45; and Section VII,E at page 46.

As ordered at the July 16 hearing, Supra was directed to notify BellSouth by 5:00 p.m. July 17, 2001, as to the requests it is withdrawing as calling for documents outside the scope of the subject matter of the audit and to identify any additional documents it requires. BellSouth is ordered to use its best efforts to complete the production of all requested documents by July 31, 2001.

The date for the completion of audit is extended to August 31, 2001. The auditor shall issue his report on that date to BellSouth, Supra, and the Tribunal.

BellSouth will have until September 21, 2001, to audit the results of the audit and submit its response to Supra and to the Tribunal. If necessary, a hearing on the audit results will be held on October 2, 2001. The parties will advise the Tribunal no later than September 10, 2001, whether they require a telephonic or an in-person hearing.

E. Confidentiality

Supra seeks clarification of the confidentiality obligations of the parties insofar as those obligations may affect Supra's ability to disclose the Award to the Florida Public Service Commission ("FPSC") and the Federal Communications Commission ("FCC") in ongoing proceedings. Supra enumerates three such proceedings: (1) In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications, Inc., FPSC Docket No. 001305-TI; (2) Complaint filed by Supra with the FCC, currently under consideration on the FCC's

accelerated docket; and (3) proceedings pursuant to Section 271 of the Telecommunications Act in which BellSouth seeks FPSC approval to provide long distance (interLATA) service to end users in Florida, In re: Petition of BellSouth Telecommunications, Inc., FPSC Docket No. 96-0786.

The parties have agreed to conduct their arbitration pursuant to the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration (the "CPR Rules"). Interconnection Agreement, Attach. 1, § 4. CPR Rules, Rule 17 provides for confidentiality in the following manner:

> Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

Supra acted within the scope and spirit of Rule 17 by bringing this matter to the Tribunal for resolution.

Initially it should be noted that disclosure of the Award is permitted (1) "in connection with judicial proceedings ancillary to the arbitration" or (2) "to protect a legal right of a party." CPR Rules, Rule 17. In addition, the parties are free to agree on other standards of confidentiality or disclosure ("[u]nless the parties otherwise agree . . ."). *Id.*

In the parties' arbitration agreement the parties expressly agreed on standards of confidentiality. Interconnection Agreement, Attach. 1, §14. As to any "arbitration proceeding, including the hearings and conferences, discovery, or other related events," such "proceeding" is to be treated as confidential "except as necessary in connection with a judicial challenge to, or enforcement of an award or unless otherwise required by an order or lawful process of a court or governmental body." Interconnection Agreement, Attach. 1, § 14.1.

An arbitration award is not an "arbitration proceeding," as the contrast between the use of "proceeding" and "a challenge to the enforcement of an award" in Section 14.1 clearly indicates. However, the Award may contain proprietary or confidential information of the parties. Interconnection Agreement, Attach. 1, § 14.3 (which references GTC § 18). Such information is denominated "Confidential Information" in the Interconnection Agreement. Interconnection Agreement, GTC, § 18.1. Assuming, without deciding, that the Award contains Confidential Information, the parties have agreed that such information "shall be safeguarded in accordance with Section 18 of the General Terms and Conditions of the Agreement." Interconnection Agreement, Attach.1, § 14.3.

Section 18 imposes a general duty on the parties to safeguard confidential and proprietary information for a period of five years from the receipt thereof. Interconnection Agreement, GTC, §§ 18.1 - 18.4. However this duty is subject to exceptions, one of which provides that "either party shall have the right to disclose Confidential Information to any mediator, arbitrator, state or federal regulatory body, the Department of Justice, or any court in the conduct of any mediation, arbitration, or approval of this Agreement or in any proceedings concerning the provision of interLATA services by BellSouth that may be required by the Act." Interconnection Agreement, GTC, § 18.5.

Moreover, the parties' agreement provides in pertinent part:

> If for any reason, the Federal Communications Commission or any other federal or state regulatory agency exercises jurisdiction over and decides any dispute related to this Agreement or to any BellSouth tariff and, as a result, a claim is adjudicated in both an agency proceeding and an arbitration proceeding under this Attachment 1, the following provisions shall apply:
>
> To the extent required by law, the agency ruling shall be binding upon the Parties for the limited purposes of regulation within the jurisdiction and authority of such agency.

> The arbitration ruling rendered pursuant to this Attachment 1 shall be binding upon the Parties for purposes of establishing their respective contractual rights and obligations under this Agreement, and for all other purposes not expressly precluded by [any] agency ruling.

Interconnection Agreement, Attach. 1, §§ 2.1.2 - 2.1.2.2.

The nature of the overlapping jurisdiction between this Tribunal and the federal and state regulatory agencies that is described in these provisions both contemplates and requires that the Tribunal and the involved agencies be made aware of any actions of either that may affect the parties' contractual rights and obligations.

Accordingly, the Tribunal finds that either party may disclose the award in the regulatory proceedings previously described before the FPSC and the FCC, subject to all applicable confidentiality provisions of those regulatory bodies, either to protect the legal rights of the disclosing party (CPR Rules, Rule 17) or as expressly provided in the parties' agreement. Interconnection Agreement, GTC, § 18.5.

To the extent Supra and BellSouth have raised additional requests for clarification, interpretation, modification or stay of the Award in their motions that are not covered in this Order, all such requests for relief are denied. The Award is effective by its terms and as expressly interpreted by this Order.

Dated: July 20, 2001

John L. Estes	M. Scott Donahey	Campbell Killefer